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First report on succession of States in respect of State responsibility

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Introduction

A. Overview

1. During its sixty-ninth session, in May 2017, the Commission decided to place the topic "Succession of States in respect of State responsibility" on its current programme of work and appointed Mr. Pavel Šturma as Special Rapporteur. The Special Rapporteur prepared the present preliminary report as his first report, examining in particular the scope and tentative programme of work, as a basis for an initial debate later in the sixty-ninth session.

2. The topic is one that the Commission identified and included in the long-term programme of work at its sixty-eighth session in 2016; the syllabus appears as an annex to the report of the Commission to the General Assembly.[1]

3. During the debate of the Sixth Committee at the seventy-first session of the General Assembly, in 2016, at least ten delegations commented briefly on the inclusion of the topic "Succession of States in respect of State responsibility" in the programme of work of the Commission. Several delegations welcomed its inclusion. The delegation of the Sudan considered that the inclusion in the Commission's agenda of this topic was timely and expressed the hope that the Commission would continue to examine the topic, given the need created by current circumstances, and that conclusions could be reached that would contribute to the progressive development and codification of international law.[2] Similarly, the delegation of Togo, welcoming the fact that the Commission was now expanding its work into areas that brought international law closer to the daily concerns of people throughout the world, supported the proposal of the Commission for the inclusion of this topic in its long-term programme of work.[3]

4. The most substantive comments came from the delegations of Slovakia and Slovenia; countries that had recently experienced the problems of succession. The delegation of Slovakia considered that the topic of succession of States in respect of State responsibility definitely merited the Commission's attention. Indeed, it would complement the Commission's earlier work relating to the issue, even if State practice might not have been sufficient and evident enough at the time of consideration of the responsibility of States for internationally wrongful acts. As a State that had faced the problem in the past, particularly in the *Gabčíkovo-Nagymaros Project* case,[4] Slovakia considered the topic useful, but drew the attention to the possible difficulties in identifying rules and principles governing succession of States in respect of responsibility.[5] The delegation of Slovenia also welcomed the inclusion of the topic in the long-term programme of work of the Commission, recognizing its potential for filling the gaps that remained after the completion of the codification of succession in respect of treaties as well as State property, archives and debts. However, Slovenia pointed out that different types of succession entailed different types of State responsibility. For example, in the dissolution of a federally organized predecessor State, as had been the case of the former Yugoslavia, the responsibility of a successor State for internationally wrongful acts could not be treated in the same manner as in secession from a

[1] Report of the International Law Commission, *Official Records of the General Assembly, Seventy-first session, Supplement No. 10* (A/71/10), annex B.

[2] *Official Records of the General Assembly, Seventy-first Session, Sixth Committee*, 21st meeting (A/C.6/71/SR.21), para. 143.

[3] *Ibid.*, 23rd meeting (A/C.6/71/SR.23), para. 20.

[4] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[5] *Official Records of the General Assembly, Seventy-first Session, Sixth Committee*, 23rd meeting (A/C.6/71/SR.23), para. 27.

centrally organized State. The work on the topic should cover such specificities. Indeed, Slovenia highlighted that it would be helpful to consider whether several already codified provisions dealing with State succession might have gained the status of customary international law.[6]

5. The delegations of the Czechia,[7] Egypt[8] and Mongolia[9] also supported the inclusion of this topic in the Commission's long-term programme of work, since it would help to fill gaps in international law.

6. An intermediate approach was expressed by the delegation of Romania, which pointed out that, even if the topic was of interest in international law, especially in the context of the State dissolution in the 1990s in Central and Eastern Europe, its analysis by the Commission would be of limited contemporary relevance. It was nonetheless ready to listen to arguments in favour of engaging in a research exercise and its proposed outcome, since it had been considered that such an exercise would complete the codification of succession of States in respect of treaties, of State property, archives and debts as well as in respect of nationality.[10]

7. A few delegations questioned the contemporary relevance of the topic. The delegation of Austria underlined that this topic was a highly controversial one that had been excluded from the previous work of the Commission. It acknowledged that it had been recently discussed by the Institute of International Law with an outcome that Austria found difficult to accept. Austria doubted that an examination of the most controversial issues of State responsibility would lead to an acceptable result at the current stage.[11] The delegation of Turkey, noting the decision of the Commission to include this topic in its long-term programme of work, pointed out that States had still not been able to agree on a course of action and that this was a complex issue presenting numerous aspects. It expressed doubts on the possibility for States to reach a common understanding on this topic and was not convinced of the relevance of the Commission taking up this topic.[12]

B. Previous work of the Commission

8. The present topic deals with two areas of international law that were already the object of codification and progressive development by the Commission. However, the previous work of the Commission had left the issue of succession of States in respect of State responsibility for possible development in the future.

9. The Commission touched on this problem in the context of its work on State succession in the 1960s. In 1963, Mr. Manfred Lachs, the Chairman of the Sub-Committee on Succession of States and Governments of the Commission, proposed including succession in respect of responsibility for torts as one of possible subtopics to be examined in relation to the work of the Commission on the question of succession of States.[13] Because of a divergence of views on its inclusion, the Commission decided to exclude the problem of torts from the scope

[6] *Ibid.*, para. 36. See also the full statement given by the delegation of Slovenia.
[7] *Official Records of the General Assembly, Seventy-first Session, Sixth Committee*, 21st meeting (A/C.6/71/SR.21), para. 11.
[8] *Ibid.*, 23rd meeting (A/C.6/71/SR.23), para. 46.
[9] *Ibid.*, 29th meeting (A/C.6/71/SR.29), para. 98.
[10] *Ibid.*, 21st meeting (A/C.6/71/SR.21), para. 68. See also the full statement given by the delegation of Romania.
[11] *Ibid.*, para. 80.
[12] *Ibid.*, para. 22. See also the full statement given by the delegation of Turkey.
[13] Report of the Sub-Committee on Succession of States and Governments, *Yearbook ... 1963*, vol. II, annex II, document A/CN.4/160 and Corr.1, p. 261.

of the topic.[14] Since that time, however, State practice and doctrinal views have developed.

10. The Commission completed its work on the responsibility of States for internationally wrongful acts in 2001. However, it did not address situations where a succession of States occurs after the commission of a wrongful act. Such succession may occur in relation to a responsible State or an injured State. In both cases, succession gives rise to rather complex legal relationships and, in that regard, it is worth noting a certain development in views within the Commission and elsewhere. While in the 1998 report the Special Rapporteur, Mr. James Crawford, wrote that there was a widely held view that a new State does not, in general, succeed to any State responsibility of the predecessor State,[15] the Commission's commentary to the 2001 draft articles on responsibility of States for internationally wrongful acts reads differently, saying: "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory".[16] The development of the practice, case law and doctrinal views from the negative succession rule to its partial rebuttal has been succinctly described by Mr. James Crawford.[17]

11. It is a normal and largely successful method for the Commission, after completing one topic, to work on other related subjects from the same area of international law. The Commission took this approach, *inter alia*, to two topics in the field of international responsibility by completing first its 2001 articles on responsibility of States for internationally wrongful acts and then its 2011 articles on the responsibility of international organizations, and to three topics in the field of succession of States, by completing draft articles for what later became the Vienna Convention on succession of States in respect of treaties (hereinafter "1978 Vienna Convention")[18] and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (hereinafter "1983 Vienna Convention"),[19] as well as its 1999 articles on nationality of natural persons in relation to the succession of States.[20]

12. Although the two Vienna Conventions mentioned above did not receive a high number of ratifications, it does not mean that the rules codified therein did not influence State practice.[21] On the contrary, in particular States in Central Europe

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[14] *Yearbook ... 1963*, vol. II, p. 298.

[15] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1-7, para. 279.

[16] Para. (3) of the commentary to article 11 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77. The text of the articles is contained in General Assembly resolution 56/83 of 12 December 2001, annex.

[17] J. Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013), pp. 435-455.

[18] Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

[19] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983), not yet in force, United Nations, *Juridical Yearbook 1983* (United Nations publication, Sales No. E.90.V.1), p. 139.

[20] Text adopted in the annex to the General Assembly resolution 55/153 of 12 December 2000. The text of the draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto is reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47-48.

[21] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, at para. 109.

applied such rules to their own succession.[22] In the same vein, non-binding documents, such as the articles on responsibility of States for internationally wrongful acts or the articles on nationality of natural persons in relation to the succession of States, have been largely followed in practice.

13. In particular, definitions contained in the articles on responsibility of States for internationally wrongful acts and in the 1978 and 1983 Vienna Conventions are applicable to the present topic. The applicability or not of other rules in the two Vienna Conventions will be addressed later in the present report (see chap. II, sect. C, below).

14. The issues of succession also appear in the context of the codification of diplomatic protection. First, they appear, as a matter of definition, in article 4 of the 2006 articles on diplomatic protection: "For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law."[23]

15. Next, article 10, paragraph 1, of the articles on diplomatic protection addresses State succession in a sense: "A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim." This rule clearly bears on a transfer of the rights or claims of an injured predecessor State. Those issues, including the rule of continuing nationality of both natural and legal persons, as well as exceptions to it, will be dealt with at a later stage (see chap. III below).

16. Finally, it is worth noting that the issue of State succession and State responsibility was addressed by the International Law Association in 2008[24] and the Institute of International Law in 2013. The latter has established one of its thematic commissions to deal with the issue.[25] At its Tallinn session in 2015, it finally adopted, on the basis of the report of the Rapporteur, Mr. Marcelo G. Kohen, its resolution on State succession in matters of State responsibility, consisting of a preamble and 16 articles. The resolution rightly stresses the need for codification and progressive development in this area.[26]

17. Chapter I of the resolution of the Institute of International Law consists of two articles, namely article 1, entitled "Use of terms", building on the terms used in the 1978 and 1983 Vienna Conventions, and article 2, entitled "Scope of the present Resolution". Chapter II includes common rules applicable to all categories of

[22] E.g. both the Czech Republic and Slovakia made a declaration, when depositing the instruments of ratification of the 1978 Vienna Convention, under article 7, paragraphs 2 to 3, that they would apply the Convention to their own successions, which took place before the entry into force of the 1978 Vienna Convention. See "Status of Treaties", chapter XXIII: Law of Treaties, Vienna Convention on Succession of States in Respect of Treaties (https://treaties.un.org).

[23] Art. 4 of the articles on diplomatic protection, General Assembly resolution 61/35 of 4 December 2006. The text of the draft articles on diplomatic protection with commentary thereto is reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 49-50.

[24] International Law Association, *Report of the Seventy-third Conference, Rio de Janeiro, 17-21 August 2008* (London, 2008), pp. 250 *et seq*.

[25] See Institute of International Law, Fourteenth Commission, *State Succession in Matters of State Responsibility*, provisional report by the Rapporteur, Mr. Marcelo G. Kohen.

[26] Institute of International Law, resolution on succession of States in matters of international responsibility, 28 August 2015, second preambular paragraph: "*Convinced* of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations".

succession of States (arts. 3 to 10). Article 3 stresses the subsidiary character of the guiding principles. Articles 4 and 5 govern, respectively, the invocation of responsibility for an internationally wrongful act committed by or against the predecessor State before the date of succession of States. The common point in those two articles is the continuing existence of the predecessor State. It reflects a general rule of non-succession if the predecessor State continues to exist. The following article (art. 6) deals with devolution agreements and unilateral declarations. Chapter III (arts. 11 to 16) includes provisions concerning specific categories of succession of States, namely transfer of part of the territory of a State, separation (secession) of parts of a State, merger of States and incorporation of a State into another existing State, dissolution of a State, and emergence of newly independent States.

18. In both the above cases, the work of private codifications bodies could and should be taken into consideration by the Special Rapporteur. It does not mean, however, that they should in any way pre-empt or limit the work of the Commission on this topic. This is basically for two reasons. As a matter of form, the legitimacy and authority of the private bodies, such as the International Law Association or the Institute of International Law, seem to be different from that of the Commission, which is a subsidiary body of the General Assembly. The Commission works in cooperation with and for the benefit of Member States, in particular through the debate on its annual reports in the Sixth Committee. As a matter of substance, the Commission and its Special Rapporteur should be free to take a different approach, if and to the extent that it is appropriate.

Chapter I

Scope and outcome of the topic

19. The present topic deals with the succession of States in respect of State responsibility. That title should determine its scope. The aim of examining the topic is to shed more light on the question of whether there are rules of international law governing both the transfer of obligations and the transfer of rights arising from international responsibility of States for internationally wrongful acts. The present and subsequent reports will delve into rules on State succession as applicable in the area of State responsibility.

20. The topic should be limited to the transfer of rights and obligations arising from internationally wrongful acts. From this point of view, the topic remains within the scope of and definitions contained in the articles on responsibility of States for internationally wrongful acts, namely the definition of "international responsibility"[27] and the definition of "internationally wrongful act".[28] According to the commentary to article 1 of the draft articles, the term "international responsibility" covers "the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures".[29]

21. Consequently, the scope of the present topic will not extend to any issues of international liability for injurious consequences arising out of acts not prohibited

[27] See art. 1 of the articles on responsibility of States for internationally wrongful acts.

[28] See art. 2.

[29] Para. (5) of the commentary to article 1 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

by international law. The obligations ensuing from such liability, which arise mainly from specialized treaty regimes, are also reflected in two final texts already adopted by the Commission, i.e. the 2001 articles on prevention of transboundary harm from hazardous activities[30] and the 2006 principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[31] The main reason for not including those issues in the present topic is that "international liability" provides for various kinds of primary obligations, ranging from prevention to allocation of harm (compensation), and not secondary obligations triggered by an internationally wrongful act. However, such primary obligations are treaty-based obligations. Therefore any possible question of transfer of such obligations should be resolved on the basis of applicable rules on the succession of States in respect of treaties.

22. The scope of the present topic will also not include questions of the succession in respect of the responsibility of international organizations. It does not mean that, in principle, a transfer of obligations or rights arising from the international responsibility of an international organization or the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization is impossible.[32] The reason for the non-inclusion relates more to the organization of work; the idea being not to overburden the present topic. While the succession of States in respect of State responsibility is not free from certain controversies about the nature of rules to be codified, the uncertainties are even greater when it comes to the succession and responsibility of international organizations. Firstly, the very idea of succession is problematic in respect of international organizations, which are entities created by States on the basis of an international act, typically an international treaty. It seems, therefore, that rare cases of the end of an organization and its possible replacement by another organization are governed by a special treaty rather than by rules of general international law. Secondly, even the articles on the responsibility of international organizations do not yet enjoy the same authority as the articles on responsibility of States for internationally wrongful acts.

23. However, the above considerations do not preclude the possibility of addressing certain issues at a later stage. Such issues may include the question of how the rules on succession with respect to State responsibility apply to injured international organizations or to injured individuals or private corporations. This is a matter for the future programme of work (see chap. III below).

24. The issue of the succession of States in respect of State responsibility deserves examination by the Commission. This is one of the topics of general international law where customary international law was not well established in the past; therefore, the Commission did not include it in its programme at an early stage. Now is the time to assess new developments in State practice and jurisprudence. This topic could fill gaps that remain after the completion of the codification of succession of States in respect of treaties (1978 Vienna Convention) and State

[30] Articles on prevention of transboundary harm from hazardous activities, General Assembly resolution 62/68 of 6 December 2007, annex. The text of the draft articles on prevention of transboundary harm from hazardous activities with commentary thereto is reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97-98.

[31] Principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities, General Assembly resolution 61/36 of 4 December 2006. The text of the draft principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities with commentary thereto is reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 66-67.

[32] See art. 1 of the articles on responsibility of international organizations, General Assembly resolution 66/100 of 9 December 2011. The text of the draft articles on responsibility of international organizations with commentary thereto is reproduced in *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), paras. 87-88.

property, archives and debts (1983 Vienna Convention), as well as in respect of nationality (1999 articles on nationality of natural persons in relation to the succession of States), on the one hand, and State responsibility, on the other.

25. The work on the topic should follow the main principles of the succession of States in respect of treaties, concerning the differentiation of transfer of a part of a territory, secession, dissolution, unification and creation of a new independent State. A realistic approach, supported by the study of case law and other State practice, warrants a distinction between cases of dissolution and unification, where the original State has disappeared, and cases of secession where the predecessor State remains. The latter usually pose more problems, as States are far less likely to accept a transfer of State responsibility.[33] It is still important to distinguish between negotiated and contested (revolutionary) secession. Negotiated secession creates better conditions for agreement on all aspects of succession, including in respect of responsibility.

26. However, the work on the topic should focus more on secondary rules on State responsibility. It is important to point out that the project aims at both active and passive aspects of responsibility, i.e. the transfer (or devolution) of both obligations of the acting (wrongdoing) State and rights (claims) of the injured State. The structure can be as follows: (a) general provisions on State succession, stressing in particular the priority of agreement; (b) residual (subsidiary) principles on the transfer of obligations arising from State responsibility; (c) principles on the transfer of rights to reparation; and (d) miscellaneous and procedural provisions.

27. Concerning the outcome of the topic, it should be both codification and progressive development of international law. It is important to note that the International Court of Justice admitted in the *Genocide (Croatia v. Serbia)* case that the rules on succession that may have come into play in that case fell into the same category as those on treaty interpretation and responsibility of States.[34]

28. Without prejudice to a future decision, an appropriate form for this topic seems to be draft articles with commentaries thereto. Notable in particular are the precedents of the articles on responsibility of States for internationally wrongful acts and those articles that became the 1978 and 1983 Vienna Conventions, as well as the articles on nationality of natural persons in relation to the succession of States. Those precedents support the choice of providing draft articles, rather than other options, such as principles or guidelines.

29. In view of the above considerations, the following draft article is proposed:

Draft article 1: Scope

The present draft articles apply to the effect of a succession of States in respect of responsibility of States for internationally wrongful acts.

[33] See Crawford, *State Responsibility*, p. 455.

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 115.

Chapter II

General provisions

A. Is there a general principle guiding succession in respect of State responsibility?

30. Traditionally, neither State practice nor doctrine gave a uniform answer to the question of whether and in what circumstances a successor State may be responsible for an internationally wrongful act of its predecessor. In some cases of State practice, however, it is possible to identify the division or allocation of responsibility between successor States.

31. In the past, the doctrine of State succession generally denied the possibility of the transfer of responsibility to a successor State.[35] As a result, it is unsurprising that most international law textbooks do not address the succession of international responsibility.[36] Where it has been included, the topic is usually only mentioned briefly and in passing.[37] Additionally, some authors only address cases of singular succession of States with respect to treaties and with respect to State property, archives, and debts.[38] These subjects were codified in the 1978 Vienna Convention and the 1983 Vienna Convention.[39] This lack of inclusion or discussion demonstrates that the relationship between the succession of States and international responsibility remains largely neglected in international legal scholarship.

32. When addressing issues of State succession, most authors assert that there is no transfer of obligations arising from international responsibility to a successor State — the theory of non-succession.[40] Support for the theory of non-succession

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[35] See, e.g., A. Cavaglieri, "Règles générales du droit de la paix", *Collected Courses of The Hague Academy of International Law*, vol. 26 (1929-I), pp. 374, 378 and 416 *et seq.*; K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie Droz, 1968), pp. 11 and 189; P.M. Eisemann and M. Koskenniemi (eds.), *State Succession: Codification Tested against the Facts* (The Hague, Academy of International Law, Martinus Nijhoff, 2000), pp. 193-194; M.C.R. Craven, "The problem of State succession and the identity of States under international law", *European Journal of International Law*, vol. 9 (1998), No. 1, pp. 142-162, at pp. 149-150; J. Malenovský, "Problèmes juridiques liés à la partition de la Tchécoslovaquie, y compris trace de la frontière", *Annuaire français de droit international*, vol. 39 (1993), pp. 305-336, at p. 334; L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR — A Study of the Tension between Normativity and Power in International Law* (Leiden, Martinus Nijhoff, 2003), p. 257; J.-P. Monnier, "La succession d'Etats en matière de responsabilité internationale", *Annuaire français de droit international*, vol. 8 (1962), pp. 65-90; D.P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge, Cambridge University Press, 1967), p. 482.

[36] Cf., e.g., A. D'Amato (ed.), *International Law Anthology* (Anderson Publishing, 1994), pp. 189-196; J. Combacau and S. Sur, *Droit international public*, 6th ed. (Paris, Montchrestien, 2004), pp. 430-442; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., vol. I: Peace, pp. 208-218 (includes a few lines on succession in relation to torts, in contrast to international responsibility).

[37] Cf., e.g., P. Daillier and A. Pellet, *Droit international public*, 7th ed. (Paris, LGDJ, 2002), pp. 555-556; P.-M. Dupuy, *Droit international public*, 9th ed. (Paris, Dalloz, 2008), p. 61; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), p. 442.

[38] Cf., e.g., V. Mikulka, *Sukcese států. Teoretická studie* [State Succession: Theoretical Study] (Prague, Academia, 1987).

[39] Cf. Mikulka, *Sukcese států* (see previous footnote above).

[40] Cf., e.g., Cavaglieri, "Règles générales" (see footnote 35 above); Marek, *Identity and Continuity of States* (see footnote 35 above); Eisemann, *State Succession* (see footnote 35 above); Craven, "The problem of State succession" (see footnote 35 above); Malenovský, "Problèmes juridiques" (see footnote 35 above); Mälksoo, *Illegal Annexation* (see footnote 35 above); Monnier, "La succession d'Etats" (see footnote 35 above); O'Connell, *State Succession* (see footnote 35 above).

stems from various theoretical arguments.[41] One theory is based on an analogy of internal law — the theory of universal succession in private law — which has origins in Roman law.[42] It follows that there is an important exception for responsibility *ex delicto*, which is not transferable from a wrongdoer to a successor.[43] Other arguments point out that a State is generally only responsible for its own international wrongful acts and not for acts of other States.[44] Therefore, a successor State should not be held responsible for wrongful acts of its predecessor, which has different international legal personality.[45] A final argument against the transfer of State responsibility draws from the "highly personal nature" of claims and obligations that arise for a State towards another State as a result of a breach of international law.[46]

33. None of these theories or private law analogies is a perfect fit, because they cannot discard a possible transfer of at least some obligations of States arising from international responsibility. As a rule, they do not take into consideration new developments and changes of the concept of State responsibility.[47] Nevertheless, the theory of non-succession has not been questioned for most of the twentieth century.[48] Professor Daniel Patrick O'Connell wrote in 1967 that it has "been taken for granted that a successor State is not liable for the delicts of its predecessor".[49] However, in the past twenty years, the view has evolved and has become more nuanced in this regard and critical of the theory of non-succession, to the extent that succession is admitted in certain cases.[50] Some authors, who accept as a general principle the theory of non-succession to State responsibility, admit that an exception exists in cases where a State has declared an intention to succeed to the rights and obligations of its predecessor State.[51] In these cases, the State would be liable to provide reparations for damages caused by its predecessor.[52]

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[41] See P. Dumberry, *State Succession to International Responsibility* (Leiden, Martinus Nijhoff, 2007), pp. 38 *et seq.*

[42] Cf., e.g., Cavaglieri, "Règles générales" (see footnote 35 above), p. 374.

[43] See H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, 1927), pp. 131-132 and 283-284.

[44] Cf., e.g., C. De Visscher, *Theory and Reality in Public International Law* (Princeton, Princeton University Press, 1968), p. 172; Daillier and Pellet, *Droit international public* (see footnote 37 above), p. 555.

[45] Monnier, "La succession d'Etats" (see footnote 35 above), p. 89.

[46] See I. Seidl-Hohenveldern, *Mezinárodní právo veřejné* [Public International Law] (Czech translation of the 9th ed; German original) (Prague, ASPI, 1999), pp. 246-247.

[47] Cf. B. Stern, "La succession d'États", *Collected Courses of The Hague Academy of International Law*, vol. 262 (1996), p. 174.

[48] See O'Connell, *State Succession* (see footnote 35 above), p. 482.

[49] *Ibid.*

[50] Cf., e.g., W. Czaplinski, "State succession and State responsibility", *Canadian Yearbook of International Law*, vol. 28 (1990), pp. 346 and 356; M.T. Kamminga, "State succession in respect of human rights treaties", *European Journal of International Law*, vol. 7 (1996), No. 4, p. 483; V. Mikulka, "State succession and responsibility", in *Law of International Responsibility*, J. Crawford, A. Pellet and S. Olleson (Oxford, Oxford University Press, 2010), p. 291; Dumberry, *State Succession* (see footnote 41 above); D.P. O'Connell, "Recent problems of State Succession in Relation to New States", *Collected courses of The Hague Academy of International Law*, vol. 130 (1970-II), p. 162; B. Stern, "Responsabilité internationale et succession d'États" in *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, L. Boisson de Chazournes and V. Gowland-Debbas (eds.) (The Hague, Martinus Nijhoff, 2001), p. 336.

[51] See P. D'Argent, *Les réparations de guerre en droit international public* (Bruxelles and Paris, Bruylant and LGDJ, 2002), p. 814; O. Schachter, "State succession: the once and future law", *Vienna Journal of International Law*, vol. 33, No. 2 (1993), p. 256; I. Ziemele, "State continuity, succession and responsibility: Reparations to the Baltic States and their peoples?", *Baltic Yearbook of International Law*, vol. 3 (2003), p. 176.

[52] Cf. Dupuy, *Droit international public* (see footnote 37 above), p. 61.

34. However, not all scholars who question the strict theory of non-succession assert the existence of a general rule on State succession.[53] They deny that current international law includes a norm excluding a possibility of any transfer of obligations arising from State responsibility.[54] In fact, they admit that responsibility under modern international law is not based on fault but rather on a more objective concept of internationally wrongful act.[55] It is conceivable, therefore, that certain obligations, including the legal consequences of responsibility, such as reparation, would transfer to a successor State.[56]

35. The development of views on whether a new State succeeds to any State responsibility of the predecessor State is well documented in the shift of Mr. James Crawford, Special Rapporteur for the topic of State responsibility, from a refusal in 1998 to a partial acceptance in 2001: "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it."[57]

36. That issue was addressed by the Institute of International Law in 2013.[58] The final resolution of the Institute, adopted at the Tallinn Session in 2015, was amended slightly to include a preamble and 16 articles, which provide for the transfer of responsibility under certain circumstances.[59] The final resolution stressed the need for codification and further progressive development in this area.[60] One idea, which could provide useful guidance for possible codification by the International Law Commission, calls for flexibility to allow for the tailoring of different solutions to different situations.[61]

37. Before coming to the detailed analysis of different categories of State succession (a matter to be addressed in the Second report in 2018), a preliminary survey of State practice is presented in the next chapter.

B. Different cases of succession

Early cases

38. Early decisions held that the successor State has no responsibility in international law for the international delicts of its predecessor. In the *Robert E. Brown* claim,[62] the claimant sought compensation for the refusal of local officials of the Boer Republics to issue licences to exploit a goldfield. The tribunal held that Brown had acquired a property right and that he had been injured by a denial of

[53] *Ibid.*

[54] See Dumberry, *State Succession* (see footnote 41 above), p. 58.

[55] Stern, "Responsabilité internationale" (see footnote 50 above), p. 335.

[56] *Ibid.* p. 338.

[57] Para. (3) of the commentary to article 11 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

[58] See Institute of International Law, Fourteenth Commission, *State Succession in Matters of State Responsibility*, provisional report by the Rapporteur.

[59] Institute of International Law, resolution on succession of States in matters of international responsibility.

[60] *Ibid.*, preambular para. 2: "*Convinced* of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations".

[61] *Ibid.*, preambular para. 4: "*Taking into account* that different categories of succession of States and their particular circumstances may lead to different solutions".

[62] *Robert E. Brown (United States) v. Great Britain*, 23 November 1923, United Nations, *Reports of International Arbitral Awards* (UNRIAA), vol. VI (Sales No. 1955.V.3), p. 120.

justice, but this was a delictual responsibility that did not devolve on Britain. Similarly, in the *Frederick Henry Redward* claim,[63] the claimants had been wrongfully imprisoned by the Government of the Hawaiian Republic, which was subsequently annexed by the United States of America. The tribunal held that "legal liability for the wrong has been extinguished" with the disappearance of the Hawaiian Republic. However, if the claim had been reduced to a money judgment, which may be considered a debt, or an interest on the part of the claimant in assets of fixed value, there would be an acquired right in the claimant, and an obligation to which the successor State had succeeded.[64]

39. However, with respect to the *Brown* and *Redward* awards, it has been observed that: "These cases date from the age of colonialism when colonial powers resisted any rule that would make them responsible for the delicts of states which they regarded as uncivilized. The authority of those cases a century later is doubtful. At least in some cases, it would be unfair to deny the claim of an injured party because the state that committed the wrong was absorbed by another state."[65]

40. The early practice also includes the dissolution of the Union of Colombia (1829-1831) after which the United States invoked the responsibility of the three successor States (Colombia, Ecuador and Venezuela), leading to the conclusion of agreements on compensation for illegal acquisition of American ships. After the independence of India and Pakistan, prior rights and liabilities (including liabilities in respect of an actionable wrong) associated with Great Britain were allocated to the State in which the cause of action arose. Many devolution agreements concluded by the former dependent territories of the United Kingdom of Great Britain and Northern Ireland also provide for the continuity of delictual responsibility of the new States.[66] However, the relevance of devolution and other agreements will be discussed at a later stage (see chap. II, sect. D, below).

41. Although decisions of arbitral tribunals are not uniform, in the *Lighthouses* arbitration,[67] the tribunal found that Greece was liable, as successor State to the Ottoman Empire, for breaches of the concession contract between that Empire and a French company after the union of Crete with Greece in 1913.[68] According to this award, "the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract".[69] Some authors, however, take the position that Greece was found liable for its own acts committed both before and after the cession of territory to Greece. The *Lighthouses* decision is also important for its critique of absolutist solutions both for and against succession with respect to responsibility: "It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors."[70]

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[63] *F.H. Redward and Claim (Great Britain) v. United States (Hawaiian Claims)*, 10 November 1925, UNRIAA, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 157, at p. 158.

[64] See O'Connell, *State Succession* (see footnote 35 above), pp. 482 and 485-486.

[65] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn., 198.), vol. 1, sect. 209, reporters' note No. 7.

[66] See United Nations, *Legislative Series, Materials on Succession of States*, ST/LEG/SER.B/14 (United Nations publication, Sales No. E/F.68.V.5).

[67] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (United Nations publication, Sales No. 63.V.3), p. 155, at p. 198 (1956).

[68] *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)* (*Lighthouses* arbitration), UNRIAA, vol. XII, p. 155. See also *International Law Reports*, vol. 23, p. 81.

[69] *International Law Reports*, vol. 23, p. 81, at p. 92.

[70] Ibid., at p. 91.

42. There are also some other cases outside Europe concerning State responsibility in situations of unification, dissolution and secession of States. One example was the United Arab Republic, created as a result of the unification of Egypt and Syria in 1958. There are three examples where the United Arab Republic as successor State took over the responsibility for obligations arising from internationally wrongful acts committed by the predecessor States. All these cases involved actions taken by Egypt against Western properties in the context of the nationalization of the Suez Canal in 1956 and the nationalization of foreign-owned properties. The first case deals with the nationalization of the Société Financière de Suez by Egypt, which was settled by an agreement between the United Arab Republic and the private corporation (1958). In other words, the new State paid compensation to the shareholders for the act committed by the predecessor State.[71] Another example is an agreement between the United Arab Republic and France resuming cultural, economic and financial relations between the two States in 1958. The agreement provided that the United Arab Republic, as the successor State, would restore the goods and property of French nationals taken by Egypt and that compensation would be paid for any goods and property not restituted (art. 5).[72] A similar agreement was also signed in 1959 by the United Arab Republic and the United Kingdom.[73]

43. The United Arab Republic lasted only until 1961 when Syria left the united State. After the dissolution, Egypt, as one of the two successor States, entered into agreements with other States (e.g. Italy, Sweden, the United Kingdom, and the United States) on compensation to foreign nationals whose property had been nationalized by the United Arab Republic (the predecessor State) during the period 1958 to 1961.[74]

44. More complicated situations arise in case of secession. After Panama seceded from Colombia in 1903, Panama refused to be held responsible for damage caused to United States nationals during a fire in the city of Colon in 1855. However, in 1926, the United States and Panama signed the Claims Convention.[75] The treaty envisaged future arbitration proceedings with respect to the consequences of the 1855 fire in Colon, including the question whether, "in case there should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903". Although no arbitration ever took place, this example shows, at least implicitly, that both States had recognized the possibility of succession in respect of State responsibility.[76]

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[71] See L. Foscaneanu, "L'accord ayant pour objet l'indemnisation de la Compagnie de Suez nationalisée par l'Egypte", *Annuaire français de droit international*, vol. 5 (1959), pp. 196 *et seq.*

[72] Accord entre le Gouvernement de la République française et le Gouvernement de la République arabe unie, *Revue générale de droit international public*, vol. 29 (1958), pp. 738 *et seq.*; cf. C. Rousseau, "Chronique des faits internationaux", *ibid.*, p. 681.

[73] Agreement between the Government of the United Kingdom and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt, United Nations, *Treaty Series*, vol. 343, No. 4925, p. 159. Cf. E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly*, vol. 8 (1959), p. 366.

[74] See B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (Ardsley, N.Y., Transnational, 1999), pp. 139, 185, 179, 235, respectively. Cf. Dumberry, *State Succession* (see footnote 41 above), pp. 107-110.

[75] United States-Panama Claims Convention, *American Journal of International Law*, vol. 27, No. 1, Supplement: Official Documents (January 1933), pp. 38-42

[76] *General Claims Commission (United States and Panama) constituted under the Claims Convention of July 28, 1926, modified by the Convention of December 17, 1932 (22 May 1933-29 June 1933)*, UNRIAA, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 293, at p. 302. Cf. Dumberry, *State Succession* (see footnote 41 above), pp. 164-165.

45. The transfer of responsibility was also invoked in the case of cession of the Tarapacá region by Peru to Chile in 1883. In the view of Italy, "the action taken with respect to the Tarapacá nitrate mines by the Peruvian Domain (action which is to be still to be [*sic*] considered as a disguised form of forced expropriation) was *Government action*, responsibility for which has now passed from the old to the new ruler of the province, from Peru to Chile".[77]

46. Another example relates to the independence of India. Both India and Pakistan became independent States on 15 August 1947. The 1947 Indian Independence (Rights, Property and Liabilities) Order deals with issues of succession of States.[78] Section 10 of the Order provides for the "transfer of liabilities for actionable wrong other than breach of contract" from the British Dominion of India to the new independent State of India. In many cases, Indian courts have interpreted Section 10 of the Order,[79] finding that India remains responsible for internationally wrongful acts committed before the date of succession.[80]

Cases of succession in Central and Eastern Europe in the 1990s

47. More recent cases concern situations of State succession in the second half of the twentieth century, some of which gave rise to the question of responsibility. They include in particular the cases of succession in Central and Eastern Europe in 1990s, such as the dissolution of Czechoslovakia, Yugoslavia and the Soviet Union, as well as the unification of Germany. It is worth noting that according to Opinion No. 9 of the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission), the successor States of the Socialist Federal Republic of Yugoslavia had to settle by way of agreements all issues relating to their succession and to find an equitable outcome based on principles inspired by the 1978 and 1983 Vienna Conventions and by the relevant rules of customary international law.[81] Some cases also relate to Asia and, although more rarely, to Africa, where a few cases of succession took place outside the context of decolonization (Eritrea, Namibia and South Sudan). Relevant findings concerning these developments may be found in the jurisprudence of the International Court of Justice and other judicial bodies, as well as treaties and other State practice.

48. The most important decision may be that of the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case. It is true that the dissolution of Czechoslovakia was based on agreement and even done in conformity with its constitution. Yet both Czech and Slovak national parliaments declared before the dissolution their willingness to assume the rights and obligations arising from the international treaties of the predecessor State.[82] Article 5 of the Constitutional Act No. 4/1993 even stated: "The Czech Republic took over rights and obligations which had arisen from international law for the Czech and Slovak Federal Republic at the day of its end, except of the obligations related to the

[77] Cession of the Tarapacá region by Peru to Chile, 1883, Observations from the Government of Italy, in United Nations, *Legislative Series. Materials on Succession of States in Respect of Matters other than Treaties*, ST/LEG/SER.B/17 (United Nations publication, Sales No. E/F.77.V.9), p. 16.

[78] See M.M. Whiteman, *Digest of International Law*, vol. 11, (Washington, 1968), pp. 873-874.

[79] Quoted in O'Connell, *State Succession* (see footnote 35 above), p. 493.

[80] See Dumberry, *State Succession* (see footnote 41 above), p. 173.

[81] Arbitration Commission of the Conference on Yugoslavia, *Opinion No. 9 of 4 July 1992*, reproduced in *International Legal Materials*, vol. 31 (1992), p. 1523, at p. 1524.

[82] See proclamation of the National Council of Slovakia to parliaments and peoples of the world (3 December 1992); proclamation of the National Council of the Czech Republic to all parliaments and nations of the world (17 December 1992).

territory which had been under the sovereignty of the Czech and Slovak Federal Republic, but not being under the sovereignty of the Czech Republic."[83]

49. The International Court of Justice said concerning the international responsibility of Slovakia: "Slovakia ... may be liable to pay compensation not only for its own wrongful conduct, but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary."[84]

50. Notwithstanding the special agreement between Hungary and Slovakia, the Court thus seems to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts.

51. The issues of State succession after the collapse of the former Yugoslavia were more complex than in the case of Czechoslovakia. One of the reasons was that, in 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) declared itself to be a continuator of the Socialist Federal Republic of Yugoslavia. However, the other former Yugoslav republics did not agree. The Security Council and the General Assembly also refused to recognize the Federal Republic of Yugoslavia as the continuing State in resolutions dated September 1992.[85] The Badinter Commission took the same position.[86] Finally, the Federal Republic of Yugoslavia changed its position in 2000, when it applied for admission to the United Nations as a new State.[87]

52. On the basis of the recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues relating to succession of States by agreement. The Agreement on Succession Issues was concluded on 29 June 2001.[88] According to its preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". The content of this Agreement and annex F will be discussed later (see chap. II, sect. D, below).

53. The first "Yugoslav" case in which the International Court of Justice touched upon the issue of succession in respect of responsibility, although in an indirect way, is the *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case. The Court was not called upon to resolve the question of succession but rather to identify the respondent party:

> "The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State. ... The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. ... That being said, it has to be borne in mind that any responsibility for past events determined in the

[83] Constitutional Act No. 4/1993 on measures relating to the extinction of the Czech and Slovak Federative Republic.

[84] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81, para. 151.

[85] Security Council resolution 777 (1992) of 19 September 1992; General Assembly resolution 47/1 (1992) of 22 September 1992.

[86] Arbitration Commission of the Conference on Yugoslavia, *Opinion No. 10 of 4 July 1992*, reproduced in *International Legal Materials*, vol. 31 (1992), p. 1525, at p. 1526.

[87] General Assembly resolution 55/12 of 1 November 2000.

[88] Agreement on Succession Issues, United Nations, *Treaty Series*, vol. 2262, No. 40296, p. 251.

present Judgment involved at the relevant time the State of Serbia and Montenegro."[89]

54. The same solution was adopted by the Court in the parallel *Genocide* dispute between Croatia and Serbia in 2008.[90] However, it is only the recent final judgment in the *Genocide (Croatia v. Serbia)* case that dealt more in detail with the issue of succession to State responsibility.[91] In spite of the fact that the Court rejected the claim of Croatia and the counter-claim of Serbia on the basis that the intentional element of genocide (*dolus specialis*) was lacking, the judgment seems to be the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession.

55. The Court recalled that, in its judgment of 18 November 2008, it had found that it had jurisdiction to rule on the claim of Croatia in respect of acts committed as from 27 April 1992, the date when the Federal Republic of Yugoslavia came into existence as a separate State and became party, by succession, to the Genocide Convention,[92] but reserved its decision on its jurisdiction in respect of breaches of the Convention alleged to have been committed before that date. In its 2015 judgment, the Court began by stating that the Federal Republic of Yugoslavia could not have been bound by the Genocide Convention before 27 April 1992, even as a State *in statu nascendi*, which was the main argument of Croatia.

56. The Court took note, however, of an alternative argument relied on by the applicant during the oral hearing in March 2014, namely that the Federal Republic of Yugoslavia (and subsequently Serbia) could have succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia for breaches of the Convention prior to that date. In fact, Croatia advanced two separate grounds on which it claimed that the Federal Republic of Yugoslavia had succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia. First, it claimed that this succession came about as a result of the application of the principles of general international law regarding State succession.[93] It relied upon the award of the arbitration tribunal in the *Lighthouses* arbitration, which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make the successor State responsible for the former's wrongdoing.[94] Secondly, Croatia argued that the Federal Republic of Yugoslavia, by the declaration of 27 April 1992, had indicated "not only that it was succeeding to the treaty obligations of the [Socialist Federal Republic of Yugoslavia], but also that it succeeded to the responsibility incurred by the

[89] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 75-76 (paras. 74, 77-78).

[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, at pp. 421-423, paras. 23-34.

[91] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*.

[92] Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[93] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 107.

[94] See the pleadings of Prof. J. Crawford, advocate for Croatia, public sitting held on Friday, 21 March 2014, at 10 a.m., at the Peace Palace, President Tomka presiding, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, document CR 2014/21, p. 21, para. 42: "We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either."

[Socialist Federal Republic of Yugoslavia] for the violation of those treaty obligations".[95]

57. Serbia maintained, in addition to the arguments relating to jurisdiction and admissibility (a new claim introduced by Croatia: no legal basis in article IX or other provisions of the Genocide Convention), that there was no principle of succession to responsibility in general international law. Quite interestingly, Serbia also maintained that all issues of succession to the rights and obligations of the Socialist Federal Republic of Yugoslavia were governed by the Agreement on Succession Issues, which lays down a procedure for considering outstanding claims against the Socialist Federal Republic of Yugoslavia.[96]

58. It is worth mentioning that the Court did not refuse and thus accepted the alternative argument of Croatia as to its jurisdiction over acts prior to 27 April 1992. The Court stated that, in order to determine whether Serbia is responsible for violations of the Convention,

"the Court would need to decide:
(1) whether the acts relied on by Croatia took place; and if they did, whether they were contrary to the Convention;
(2) if so, whether those acts were attributable to the [Socialist Federal Republic of Yugoslavia] at the time that they occurred and engaged its responsibility; and
(3) if the responsibility of the [Socialist Federal Republic of Yugoslavia] had been engaged, whether the [Federal Republic of Yugoslavia] succeeded to that responsibility."[97]

59. It is important to note that the Court considered the rules on succession that may have come into play in that case fell into the same category as those on treaty interpretation and responsibility of States.[98] However, not all the Judges of the Court shared the view of the majority. In her Declaration, Judge Xue said that "[t]o date, in none of the codified rules of general international law on treaty succession and State responsibility, State succession to responsibility was ever contemplated ... Rules of State responsibility in the event of succession remain to be developed".[99] Notwithstanding the scepticism of certain judges, the topic seems to fit perfectly with the mandate of the Commission, which includes both progressive development and codification of international law.

60. Another interesting case is the investment arbitration *Mytilineos Holdings SA*. In this case, the arbitral tribunal noted that, after the commencement of the dispute, the declaration of independence of Montenegro took place. Although the tribunal was not called upon to decide on legal issues of State succession, it noted that it was

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[95] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 107.

[96] Cf. the pleadings of Prof. A. Zimmermann, advocate for Serbia, who referred to article 2 of annex F to the Agreement, which provides for the settlement of disputes by the Standing Joint Committee established under the Agreement. Public sitting held on Thursday, 27 March 2014, at 3 p.m., at the Peace Palace, President Tomka presiding, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, document CR 2014/22, p. 27, paras. 52-54.

[97] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 112.

[98] Ibid., para. 115.

[99] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, declaration of Judge Xue, para. 23.

undisputed that the Republic of Serbia would continue in the legal status of Serbia and Montenegro at the international level.[100]

61. Numerous examples providing evidence of State succession relate to German unification. After the reunification, the Federal Republic of Germany assumed the liabilities arising from the delictual responsibility of the former German Democratic Republic.[101] One of the unsettled issues existing at the time of unification concerned compensation for possessions expropriated in the territory of the former German Democratic Republic. Except for a few lump sum agreements, the German Democratic Republic had always refused to pay compensation. It was only in the last period before the unification that the German Democratic Republic adopted an act on settlement of property issues (29 June 1990). In connection with this development the Governments of the Federal Republic of Germany and the German Democratic Republic adopted the joint declaration on the settlement of outstanding issues of property rights (15 June 1990).[102] According to section 3 of the joint declaration, the property confiscated after 1949 should be returned to the original owners. This may be mostly interpreted as a matter of delictual liability (torts) rather than that of State responsibility.

62. However, it is worth noting that the Federal Administrative Court of the Federal Republic of Germany dealt with the issue of State succession in respect of aliens. Although the Court refused to accept the responsibility of the Federal Republic of Germany for an internationally wrongful act (expropriation) committed by the German Democratic Republic against a Dutch citizen, it recognized that the obligations of the former German Democratic Republic to pay compensation transferred to the successor State.[103]

63. It would be possible to list a number devolution agreements and other agreements that are of interest for the present topic. However, they will be addressed in a section of the report focused on the impact of agreements or unilateral declarations on the succession to State responsibility (see chap. II, sect. D below).

64. As a provisional conclusion, the Special Rapporteur favours a realistic approach. Such approach, supported by the study of case law and State practice, warrants a distinction between cases of dissolution and unification, where the original State has disappeared, and cases of secession where the predecessor State remains. The latter usually pose more problems, as States are far less likely to accept a transfer of State responsibility.[104] It is still important to distinguish between negotiated and contested (revolutionary) secession. Negotiated secession creates better conditions for agreement on all aspects of succession, including in respect of responsibility.

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[100] *Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia, Partial Award on Jurisdiction* (arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules), Zurich, 8 September 2006, para. 158.

[101] Art. 24 of the Treaty on the Establishment of German Unity, 31 August 1990, *International Legal Materials*, vol. 30, p. 463.

[102] *Bundesgesetzblatt* (Federal Law Gazette of the Federal Republic of Germany), part II, 1990, p. 1237.

[103] Decision of 1 July 1999 of the Supreme Administrative Court (7 B 2.99). Cf. Dumberry, *S Succession* (see footnote 41 above), p. 90.

[104] See Crawford, *State Responsibility*, p. 455.

C. Do any rules in the two Vienna Conventions on succession apply?

65. The present section will address the relevance and possible application of certain rules in the two Vienna Conventions on succession to the present topic. This is a very important question because international law is one legal system. If the principle of harmonization should apply in the relationships between various branches of international law, it is even more relevant within one single branch, being the law of State succession. Therefore, terms should be used in a uniform manner for succession in respect of treaties, State property debts and archives, nationality of natural persons, and State responsibility, unless there are serious reasons for a special use of terms.

66. It is not surprising that the topic of State responsibility was excluded from the scope of the two Vienna Conventions on succession of States. It was done precisely in two "without prejudice" clauses, namely in article 39 of the 1978 Vienna Convention, according to which: "The provisions of the present Convention shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States". In a similar sense, but even more broadly drafted, such a clause appears in article 5 of the 1983 Vienna Convention: "Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention".[105]

67. In the view of the Special Rapporteur, such without prejudice clauses only excluded the international responsibility of States from the scope of those Vienna Conventions, without taking any position on the existence or not of rules on succession of States in respect of matters other than those provided for in those Conventions. This a technique widely used in the practice of States and in the drafts of the Commission, for example in the law of treaties.[106]

68. Consequently, nothing prevents the use of the terms and definitions that appear in both Vienna Conventions and, eventually, in the articles on nationality of natural persons in relation to the succession of States. Rather to the contrary, in the light of a systemic integration approach, it is necessary to use the same terms for succession in respect of treaties, State property, debts and archives, nationality of natural persons, and State responsibility, unless there are serious reasons to use a special meaning.

69. As it was done by the Commission in the past, the Special Rapporteur proposes to leave the relevant definitions contained in article 2 of the 1978 and 1983 Vienna Conventions and in article 1 of the articles on nationality of natural persons in relation to the succession of States unchanged so as to ensure consistency in the use of terminology in the work on questions relating to the succession of States.[107] Terms used in the articles refer, at this stage, to "succession of States", "predecessor State", "successor State" and "date of the succession of States". This does not preclude a possibility of inclusion of other definitions depending on the

[105] Art. 5 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

[106] Cf. art. 73 of the Vienna Convention on the Law of Treaties (1969), United Nations, Treaty Series, vol. 1155, No. 18232, p. 331; art. 74, para. 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), not yet in force, *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II, document A/CONF.129/15.

[107] *Yearbook ... 1999*, vol. II (Part Two), para. 47.

needs and progress of work. Such definitions may include, in particular, specific categories of succession of States.

70. The term "succession of States" is defined identically in article 2, paragraph 1, of both Vienna Conventions[108] and article 2, subparagraph (a), of the articles on nationality of natural persons in relation to the succession of States.[109] It is used here as referring "exclusively to *the fact of the replacement* of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event".[110] It is important to stress it in particular in the context of State responsibility, where a possible transfer of rights and obligations arising from an internationally wrongful act will only be discussed at a later stage.

71. The meaning of other terms, namely "predecessor State",[111] "successor State"[112] and "date of the succession of States"[113] are consequential upon the meaning of the term "succession of States". Therefore, the definitions of these terms in article 2, paragraph 1, of both Vienna Conventions and article 2 of the articles on nationality of natural persons in relation to the succession of States can easily be used also for the purpose of the present topic. However, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.[114]

72. However, the adoption of certain terms does not imply that all or most rules of the two Vienna Conventions are applicable to the present topic. Firstly, as it is generally recognized, there is no universal succession of States but rather several areas of legal relations to which succession of States applies. Therefore, rules on succession of States in one area, e.g. in respect of treaties, may differ from the rules in another area, e.g. in respect of State property, debts and archives. This must be taken into consideration when it comes to the issue of succession in respect of State responsibility.

73. Secondly, the so-called singular succession of States (i.e. special rules governing special cases of succession) also suggests a preliminary conclusion that the application of rules governing succession of States in one area does not prejudge or condition the applicability of rules governing succession of States in respect of another category of relations. In other words, while it may be a presumption that a successor State that

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[108] Art. 2, para. 1 (b), of the Vienna Convention on Succession of States in Respect to Treaties; and art. 2, para. 1 (a), of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

[109] Art. 2, subpara. (a), of the articles on nationality of natural persons in relation to the succession of States, General Assembly resolution 55/153 of 12 December 2000, annex. The text of the draft articles on nationality of natural persons in relation to the succession of States with commentary thereto is reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47-48.

[110] Para. (2) of the commentary to article 2, *Yearbook ... 1999*, vol. II (Part Two), para. 48.

[111] Art. 2, para. 1 (c), of the Vienna Convention on Succession of States in Respect to Treaties; art. 2, para. 1 (b), of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts; art. 2, subpara. (b), of the articles on nationality of natural persons in relation to the succession of States.

[112] Art. 2, para. (1) (d), of the Vienna Convention on Succession of States in Respect to Treaties; art. 2, para. 1 (c), of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts; art. 2, subpara. (c), of the articles on nationality of natural persons in relation to the succession of States.

[113] Art. 2, para. 1 (e), of the Vienna Convention on Succession of States in Respect to Treaties; art. 2, para. 1 (d), of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts; art. 2, subpara. (g), of the articles on nationality of natural persons in relation to the succession of States.

[114] Para. (3) of the commentary to article 2 of the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), para. 48.

succeeded to a treaty of the predecessor State could also succeed to obligations arising from the violation of the treaty, it should not be taken as granted. The two areas of succession of States are independent and governed by special rules. The question whether or not the successor State has certain obligations or rights arising from the responsibility of the predecessor State is a separate question from the succession in respect of primary obligations (under the given treaty). This question thus must be resolved not on the basis of the 1978 Vienna Convention but under the present topic.

74. In addition to the terms taken over from the article 2 of the 1978 and 1983 Vienna Conventions and in article 1 of the articles on nationality of natural persons in relation to the succession of States, it seems also that the term "State responsibility" needs to be defined at this stage of the work. Here again, the Special Rapporteur wants to rely on the previous work of the Commission and not to depart from the articles on responsibility of States for internationally wrongful acts. The central terms appear in article 1: "Every internationally wrongful act of a State entails the international responsibility of that State."[115]

75. According to the commentary to article 1, the term "international responsibility" in that article "covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law".[116] The Special Rapporteur is of the view that this definition could be also used for the purposes of the present topic. Even though the report does not envisage the succession of States in respect of State responsibility as a transfer of the responsibility as such but as a transfer of rights and obligations arising from international responsibility of a (predecessor) State, the definition of "State responsibility" seems to appropriate. Its inclusion helps to distinguish the present topic from other possible issues, such as "international liability" of States or responsibility of international organizations. It also concurs to the distinction, noted by O'Connell and other authors, between the succession to responsibility with respect to an internationally wrongful act as opposable to another State and succession with respect to a municipal tort.[117]

76. Last but not least, the above definition also serves another purpose, which is to distinguish the present topic from the succession of States in respect of State debts. This seems to be one of the fundamental distinctions proving the limited application of rules in the two Vienna Conventions to the succession in respect of State responsibility. The question whether obligations arising from wrongful acts are "illiquid debts" subject to the 1983 Vienna Convention is not an easy one. However, it needs to be addressed, preferably at this early stage of the work.

77. The question was addressed in a classical manner by O'Connell. According to him, "[a] tort committed by agents of a State merely gives rise to a right of action for unliquidated damages of a penal or compensatory character. It does not create an interest in assets of a fixed or determinable value. The claimant has no more than the capacity to appear before a court which thereupon may or may not create in his favour a debt against the offending State. Until such a debt is created, however, the claimant's interest is not an acquired right in the sense defined [previously]".[118]

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[115] Art. 1 of the articles on responsibility of States for internationally wrongful acts.

[116] Para. (5) of the commentary to article 1 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

[117] O'Connell, *State Succession* (see footnote 35 above), p. 482. See also Crawford, *State Responsibility*, p. 436.

[118] D.P. O'Connell, *The Law of State Succession* (Cambridge, Cambridge University Press, 1956), p. 201.

78. This distinction seems to be helpful even today, although the cited book reflects the traditional or absolute approach of non-succession in respect of responsibility[119] or, in other words, the "negative succession" rule.[120] Neither should O'Connell's distinction be discarded on the ground that he may refer to municipal torts rather than to international responsibility of States. According to his traditional approach, succession in respect of State responsibility was hardly conceivable. Nevertheless, he referred to the same early cases, such as the *Brown* and the *Redward* claims, which have been analysed in the report (see sect. B above). And he concluded that "[t]he test of a tortious unliquidated claim must be sought in the law under which the claim arises".[121] Of course, as the definition of "State responsibility" suggests, for the purposes of the present topic, the applicable law will be international law, instead of the municipal legal order which O'Connell had probably in mind.

79. A possible reading to be taken from his book is, however, quite clear and important. A debt means "an interest in assets of a fixed or determinable value" existing on the date of the succession of States. Such a debt may arise from a contract, a municipal tort or even from an internationally wrongful act of a State. In particular, it will be a debt for the purposes of rules on succession in respect of State debts, if such an interest in assets of a fixed or determinable value was acknowledged by the State or adjudicated by an international court or arbitration at the date of succession. In this hypothesis, the rules on succession of States in respect of State debts are to be applied.

80. If, however, an internationally wrongful act occurs before the date of the succession but the legal consequences arising therefrom have not yet been specified (e.g. a specific amount of compensation was not awarded by an arbitral tribunal), then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility. In other words, the question whether there is a transfer of rights and obligations or not is one that belongs to the present topic and not the rules under the 1983 Vienna Convention.

81. In view of the above considerations, the following draft article on definitions is proposed:

Draft article 2: Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of territory to which the succession of States relates;

(e) "international responsibility" means the relations which arise under international law from the internationally wrongful act of a State;

[...]

[119] See Dumberry, *State Succession* (see footnote 41 above), pp. 35-37.
[120] See J. Crawford, *State Responsibility*, p. 437.
[121] O'Connell, *The Law of State Succession* (see footnote 117 above), p. 206.

82. Other definitions of terms may be added to draft article 2 in a course of the future work.

D. Nature of the rules to be codified and the relevance of agreements and unilateral declarations

83. The most important and complicated issue seems to be to determine the nature of the rules on succession of States in respect of State responsibility. The analysis of State practice, case law and writings done so far shows two preliminary conclusions. First, the traditional thesis of non-succession has been questioned by modern practice. Second, this does not mean that the opposite thesis, i.e. automatic succession in all cases, is true. At best, it is possible to conclude that it was succession in certain cases. The transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needs to be proved on a case-by-case basis.

84. At the same time, it is important to take into account that situations of succession of States, although not so rare as it may appear at first glance, are not too frequent either. This is relevant even more with respect to State responsibility. While all cases of State succession involve the issue of succession in respect of treaties, the transfer of rights or obligations arising from State responsibility is at issue only in certain cases of succession of States. In addition, the situation may differ in cases of negotiated succession and contested succession.

85. Finally, succession of States is of a highly political nature, in particular if contested. Even cases of negotiated succession involve a number of complex and technical questions that are settled by agreement between the States concerned. Therefore, any general customary norms of international law crystallize and are established only slowly in this area. States prefer to have freedom to negotiate the conditions of succession, if necessary. It also reflects the fact that a low number of States have ratified the 1978 and 1983 Vienna Conventions thus far. Most of them perhaps do not find the codification of rules on succession of States useful. However, the experience of the States that underwent succession during past 25 years proves the usefulness of such rules.[122] Some of them applied such rules to their own succession, even though the Vienna Conventions were not yet in force at the date of succession.

86. This seems to support the view that in the present topic, like in the two Vienna Conventions and articles on nationality of natural persons in relation to the succession of States, the rules to be codified should be of a subsidiary nature. As such, they may serve two purposes. First, they can present a useful model that may be used and also modified by the States concerned. Second, in cases of lack of agreement, they can present a default rule to be applied in case of dispute.

[122] This is shown in case of the 1978 Vienna Convention, which has 22 Parties (status as of 20 May 2017). Whereas the former Yugoslavia ratified the Convention on 28 April 1980 and the six successor States became Parties by way of succession, the situation of the former Czechoslovakia was different. Slovakia became Party on 24 April 1995 and the Czech Republic on 26 July 1999. However, both States made declarations pursuant to article 7, paragraphs 2 and 3, of the said Convention that they would apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other Contracting States or State Party to the Convention accepting the declaration (see https://treaties.un.org/, chap. XXIII; the texts of the two declarations differ slightly)

Relevance of the agreements

87. In principle, an agreement between the States concerned should have priority over subsidiary general rules on succession to be proposed in the work under the present topic. However, this warrants a careful analysis of the relevance of such agreements, having in view the *pacta tertiis* rule.[123] From this point of view, there is a difference between the 1978 Vienna Convention and the 1983 Vienna Convention. The former includes article 8, which reflects the relative effect of treaties in the following way:

> "The obligations and rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State."[124]

88. However, it is worth mentioning the following extract from the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*:

> "A change in participation entails a change in the obligations and rights of all parties to the treaty, and it cannot therefore result from the provisions of another treaty, by virtue of the rule *pacta tertiis nec nocent nec prosunt*, which has been codified as article 34 of the Vienna Convention on the Law of Treaties. However, if the devolution agreements unambiguously provide that the successor State shall henceforth assume all obligations and enjoy all rights which would exist by virtue of the application of treaties, the Secretary-General, if he were to receive such a devolution agreement, would treat such an agreement as an instrument of succession, but only if the treaties concerned were clearly and specifically identified."[125]

89. By contrast, there is no similar provision in the 1983 Vienna Convention. Neither is such a provision contained in the articles on nationality of natural persons in relation to the succession of States. It seems that it follows from the object and purpose of the respective instruments. By definition, the 1978 Vienna Conventions governs the succession to treaties that are to bind the successor State and one or more third States. Consequently, the *pacta tertiis* rule is always applicable. However, this is not necessarily the case in succession of States in respect of State property, archives and debts, where an agreement often provides for distribution of property, archives and debts between a predecessor State and a successor State or among two or more successor States.

90. As to the articles on nationality of natural persons of natural persons in relation to the succession of States, they deal mostly with the issues of internal laws. As the commentary of the Commission points out, "[u]nlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals".[126] Therefore, any reference to the *pacta tertiis* rule was not considered necessary.

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[123] Art. 34 of the Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331: "A treaty does not create either obligations or rights for a third State without its consent."

[124] Art. 8, para. 1, of the Vienna Convention on Succession of States in Respect to Treaties.

[125] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, Prepared by the Treaty Section of the Office of Legal Affairs*, ST/LEG/7/Rev.1 (United Nations publication, Sales No. E.94.V.15), p. 91, para. 310.

[126] Para. (2) of the commentary to article 2 of the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), para. 48.

91. The situation seems to be more complex when it comes to the present topic. On the one hand, rules on State responsibility are different from the law of treaties. Whereas treaties are based on the consent of the parties, State responsibility arises from internationally wrongful acts. This may imply that the *pacta tertiis* rule could be less important for the succession of States in this area. On the other hand, agreements between States concerning their succession are different in nature. They may confirm that a successor State is ready to accept obligations arising from State responsibility of its predecessor. However, they may also limit or exclude such obligations. That is why consent of the third States is important and cannot be presumed in all cases.

92. This was probably the reason why the resolution of the Institute of International Law adopted in Tallinn in 2015 paid attention to the impact of devolution agreements and unilateral acts (art. 6). As to the role of agreements, this article divides the problem of agreements in two paragraphs:

> 1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subject to the rules relating to the consent of the parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.
>
> 2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement, providing that such obligations shall devolve upon the successor State.[127]

93. While paragraph 1 deals with more general issue of validity and effects of agreements between the predecessor State and non-State entity (such as a national liberation movement) or an autonomous entity of that State from the point of view of the law of treaties, only paragraph 2 refers to the *pacta tertiis* rule concerning devolution agreements. The content of paragraph 1 seems to be generally acceptable. However, in the present topic, the Special Rapporteur intends to address certain issues, such as national liberation movements, insurgents and other non-State entities at a later stage.

94. Concerning paragraph 2, which reflects in substance the content of article 8 of the 1978 Vienna Convention, however, the analysis of a variety of relevant agreements suggests that a nuanced approach be taken. It depends very much on the content of and parties to such agreements. Indeed, the vast majority of agreements are classical devolution agreements between the predecessor State and the successor State. The second category, however, consists of some agreements that concern the transfer of obligations that are adopted between the successor State and the third State or States. Finally, there are also a few agreements of a mixed nature that do not fit for any of the above categories.

[127] Institute of International Law, resolution on succession of States in matters of international responsibility, art. 6.

a. Devolution agreements

95. The first and largest group of examples are the classical devolution agreements. They are situated in the period of several decades (between 1947 and the 1970s), and are clearly related to the process of decolonization. Probably one of the first examples is the Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan, which provides, in article 4: "Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions."[128]

96. Most of such devolution agreements were concluded by the United Kingdom with its former dominions and territories, such as Ceylon,[129] Burma,[130] Ghana,[131] Federation of Malaya,[132] Nigeria,[133] Sierra Leone,[134] Jamaica,[135] Trinidad and Tobago,[136] Malta,[137] Gambia[138] and Seychelles.[139] Some agreements were concluded as treaties in full form, while others by an exchange of letters constituting an agreement. Since such agreements are treaties between the predecessor State and the successor State, it is clear that the *pacta tertiis* rule applies.

97. Similar devolution agreements were adopted by other States, such as the Netherlands and the United States of Indonesia,[140] where, however, the situation is

[128] Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan [Schedule to the Indian Independence (International Arrangements) Order, 1947], in United Nations, *Legislative Series, Materials on Succession of States*, ST/LEG/SER.B/14 (see footnote 66 above), p. 162.

[129] External Affairs Agreement between the United Kingdom of Great Britain and Northern Ireland and Ceylon (1947), United Nations, *Treaty Series*, vol. 86, p. 25.

[130] Article 2, Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters (1947), United Nations, *Treaty Series*, vol. 70, p. 183.

[131] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of Ghana (1957), United Nations, *Treaty Series*, vol. 287, No. 4189, p. 233.

[132] Exchange of letters constituting an agreement concerning succession to rights and obligations arising from international instruments (1957), United Nations, *Treaty Series*, vol. 279, No. 4046, p. 287.

[133] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of the Federation of Nigeria (1960), United Nations, *Treaty Series*, vol. 384, No. 5520, p. 207.

[134] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of Sierra Leone (1961), United Nations, *Treaty Series*, vol. 420, No. 6036, p. 11.

[135] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of Jamaica (1962), United Nations, *Treaty Series*, vol. 457, No. 6580, p. 117.

[136] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of Trinidad and Tobago (1962), United Nations, *Treaty Series*, vol. 457, No. 6581, p. 123.

[137] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of Malta (1964), United Nations, *Treaty Series*, vol. 525, No. 7594, p. 221.

[138] Exchange of letters constituting an agreement relating to the inheritance of international rights and obligations by the Government of the Gambia (1966), United Nations, *Treaty Series*, vol. 573, No. 8333, p. 203.

[139] Exchange of notes constituting an agreement concerning treaty succession (1976), United Nations, *Treaty Series*, vol. 1038, No. 15527, p. 135.

[140] Art. 5 of the Draft Agreement on Transitional Measures, in Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia (1949), United Nations, *Treaty Series*, vol. 69, No. 894, p. 3, at p. 266.

less clear (it seems that the agreement deals only with succession to or termination of certain treaties), France and India,[141] Laos[142] and Morocco,[143] or Italy and Somalia.[144] Another devolution agreement was concluded between New Zealand and Western Samoa.[145]

98. There is one agreement that can be singled out because, while having most features of devolution, it has more parties than just the predecessor State (the United Kingdom) and the successor State (Cyprus). Article 8 of the Treaty concerning the Establishment of the Republic of Cyprus (1960) provides in paragraph 1 that: "All international obligations and responsibilities of the Government of the United Kingdom shall henceforth, in so far as they may be held to have application to the Republic of Cyprus, be assumed by the Government of the Republic of Cyprus." Paragraph 2 refers similarly to the international rights and benefits.[146] The mixed nature arises from the fact that this agreement was concluded by four parties; in addition to the United Kingdom and Cyprus, it was also concluded by Greece and Turkey. Consequently, it is binding on all parties, which are those most likely affected by the transfer of rights and obligations. Regarding other States, however, the Treaty is subject to the *pacta tertiis* rule.

99. To sum up provisionally, devolution agreements are agreements between the predecessor State and the successor State, therefore the *pacta tertiis* rule applies. They mostly relate to succession in respect of treaties. However, they also address the transfer of obligations and responsibilities arising from their application. They may nevertheless have certain impact on the third States. Concerning such possible effects, rules in articles 35 and 36 of the Vienna Convention on the Law of Treaties should be taken into account. When it comes to rights of third States, their assent may be presumed. A transfer of obligations from State responsibility to the successor State may be viewed so as to accord rights to the third injured State. However, it is also possible that succession will bring some obligations for third States. Then it is required that the third State expressly accepts such obligations.

b. Claims agreements

100. Of greater interest for the present topic are other agreements that may be called claims agreements. Those agreements seem to have certain distinctive features. They are concluded between the successor State and the third State that was affected by an internationally wrongful act committed by the predecessor State. Such agreements are less numerous but very important, because they are directly related to the transfer of obligations arising from State responsibility. And such agreements are not linked to the context of decolonization, as they appear even

[141] Art. 3 of the Agreement between India and France for the settlement of the question of the future of the French Establishments in India (1954), in United Nations, *Legislative Series. Materials on Succession of States in Respect of Matters other than Treaties*, ST/LEG/SER.B/17 (see footnote 77 above), p. 80: "The Government of India shall succeed to the rights and obligations resulting from such acts of the French administration as are binding on these Establishments."

[142] Art. 1 of the Traité d'amitié et d'association entre le Royaume du Laos et la République Française [Treaty of Friendship and Association] (1953), in United Nations, *Legislative Series. Materials on Succession of States*, ST/LEG/SER.B/14 (see footnote 66 above), p. 72, also p. 188.

[143] Art. 11 of the Traité entre la France et le Maroc [Treaty between France and Morocco] (1956), in *ibid.*, p. 169.

[144] Treaty of Friendship, with Exchange of Notes (1960), in *ibid.*, p. 169.

[145] Exchange of letters constituting an agreement relative to the inheritance of international rights and obligations by the Government of Western Samoa (1962), United Nations, *Treaty Series*, vol. 476, No. 6898, p. 3.

[146] Article 8, Treaty concerning the Establishment of the Republic of Cyprus (1960), United Nations, *Treaty Series*, vol. 382, No. 5476, p. 8.

before and after this period. Therefore, they can also shed more light on other categories of succession of States.

101. One of the early examples is the agreement between Austria, Hungary and the United States of 1921. Under its article I, "the three Governments shall agree upon the selection of a Commissioner who shall pass upon all claims for losses, damages or injuries suffered by the United States or its nationals embraced within the terms of the Treaty of August 24, 1921, between Austria and the United States and/or the Treaty of August 29, 1921, between the United States and Hungary, and/or the Treaties of St. Germain-en-Laye and/or Trianon, and shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of all such claims".[147]

102. Another example is the Claims Convention between the United States of America and Panama. Its article I provides, *inter alia*, that "in case it should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903, and the Government of Panama agrees to co-operate with the Government of the United States by means of amicable representations in the negotiation of such arbitral agreement between the three countries".[148]

103. To make a provisional conclusion, such agreements resolve certain issues of succession of States in respect of obligations arising from State responsibility between the parties. They do not provide for obligations or rights regarding third parties. Therefore the *pacta tertiis* rule does not apply here. Such agreements are binding and have priority over any possible (subsidiary) general rules.

c. Other agreements

104. The next group of agreements seems to be the most heterogeneous. It differs from the classical devolution agreements and the claims agreements. Some of these agreements include more than two parties. These agreements belong to the most recent ones, being adopted outside the decolonization context, from the 1990s onwards.

105. The first example concerns the unification of Germany, as article 24 of the Treaty on the Establishment of German Unity (1990) deals with settlements of claims and liabilities vis-à-vis foreign countries and the Federal Republic of Germany. It provides that "the settlement of the claims and liabilities remaining when the accession takes effect shall take place under instructions from, and under the supervision of, the Federal Minister of Finance".[149]

106. Although this provision could be assimilated to devolution agreements, it may be singled out by the fact that it is the successor State that accepts, in principle, obligations towards the third States and, in addition, it provides for certain administrative arrangements.

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[147] Agreement for the Determination of the Amounts to be paid by Austria and by Hungary in satisfaction of their Obligations under the Treaties concluded by the United States with Austria on 24 August 1921, and with Hungary on 29 August 1921 (1924), League of Nations, *Treaty Series*, vol. 48, No. 1151, p. 69.

[148] Art. I of the Claims Convention between the United States of America and Panama (1926), *United Nations Reports of International Arbitral Awards*, vol. VI, p. 301, at p. 302.

[149] Art. 24 of the Treaty on the Establishment of German Unity (1990), *Bundesgesetzblatt* (Federal Law Gazette of the Federal Republic of Germany), part II, No. 35, 28 September 1990, p. 885, in English at *International Legal Materials*, vol. 30, p. 457; the text here is the translation provided by the German Historical Institute of Washington, D.C., http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=78.

107. This is a typical element for the latest generation of agreements. Another example is the Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters (2012). It was concluded and operates in very different circumstances. First, it is an agreement between the predecessor State and the successor State in a case of separation of one part of the territory (secession). Second, it only governs their mutual rights and obligations of a financial nature. It is thus closer to a settlement of debts agreement. Third, the cancellation of outstanding claims between the parties is without prejudice to any private claimants. Fourth, the agreement envisages an establishment of joint committees or similar mechanisms.[150]

108. The most complex agreement settles the succession of the former Yugoslavia. Based on recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues of State succession by agreement. The Agreement on Succession Issues was concluded on 29 June 2001. According to its preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". Article 2 of annex F of the Agreement dealt with the issues of international wrongful acts against third States before the date of succession, saying that:

> "[a]ll claims against the [Socialist Federal Republic of Yugoslavia] which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement. The successor States shall inform one another of all such claims against the [Socialist Federal Republic of Yugoslavia]."

109. It can be assumed from this passage, which sets up a special mechanism for outstanding claims against the Socialist Federal Republic of Yugoslavia, that the obligations of the predecessor State do not disappear.[151] In addition, article 1 of annex F refers to the transfer of claims from the predecessor State to a successor State.[152]

110. The specific nature of this agreement arises from the fact that it was concluded by five successor States, former federal republics of Yugoslavia (Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The former Yugoslav Republic of

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[150] Art. 5 of the Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters (2012), available at the United Nations peacemaker database, http://peacemaker.un.org/node/1617:

"5.1.1 Each Party agrees to unconditionally and irrevocably cancel and forgive any claims of non-oil related arrears and other non-oil related financial claims outstanding to the other Party [...]

5.1.2 To that end, each Party acknowledges that there shall be no further liability owed to the other Party in respect of such arrears or other financial claims.

5.1.3 The Parties agree that the provisions of Article 5.1.1 shall not serve as a bar to any private claimants. [...]

5.1.4 The Parties agree to take such action as may be necessary, including the establishment of joint committees or any other workable mechanisms, to assist and facilitate the pursuance of claims by nationals or other legal persons of either State to pursue claims in accordance with, subject to the provisions of the applicable laws in each State."

[151] Cf. Dumberry, *State Succession* (see footnote 41 above), p. 121.

[152] "All rights and interests which belonged to the [Socialist Federal Republic of Yugoslavia] and which are not otherwise covered by this Agreement (including, but not limited to, patents, trade marks, copyrights, royalties, and claims of and debts due to the [Socialist Federal Republic of Yugoslavia]) shall be shared among the successor States, taking into account the proportion for division of [Socialist Federal Republic of Yugoslavia] financial assets in Annex C of this Agreement."

Macedonia). It is not a devolution agreement because the predecessor State no longer existed. Neither is it a case of claims agreement. Nevertheless, this agreement and its implementation should be closely looked at, probably in one of the Special Rapporteur's future reports. It also involves an issue of plurality of responsible States[153] and/or that of shared responsibility.[154] The issue of plurality of successor States was also dealt with in the 2015 resolution of the Institute of International Law.[155] Therefore, it seems premature to draw any conclusions at this early stage of the topic.

111. However, the preceding paragraphs of the present section allow for making certain conclusions on the impact of agreements to the succession of States in respect of State responsibility. It seems that devolution agreements, claims agreements and other agreements have to be taken into account when it comes to the transfer of obligations or rights arising from State responsibility. While devolution agreements are subject to the *pacta tertiis* rule and require consent of the third States, other agreements have full effects according to their provisions and the rules of the law of treaties. In view of these considerations, the following draft article is proposed:

Draft article 3: Relevance of the agreements to succession of States in respect of responsibility

1. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

2. The rights of a predecessor State arising from an international wrongful act owed to it by another State before the date of succession of States do not become the rights of the successor States towards the responsible State only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such rights shall devolve upon the successor State.

3. Another agreement than a devolution agreement produces full effects on the transfer of obligations or rights arising from State responsibility. Any agreement is binding upon the parties to it and must be performed by them in good faith.

4. The preceding paragraphs are without prejudice to the applicable rules of the law of treaties, in particular the *pacta tertiis* rule, as reflected in articles 34 to 36 of the Vienna Convention on the Law of Treaties.

Relevance of unilateral acts

112. The next and last issue to be addressed in the present report concerns the role of unilateral acts. Like in the case of devolution agreements, the 1978 Vienna Convention takes a strict approach as to the relevance of such unilateral acts: "Obligations or rights under treaties in force in respect of a territory at the date of a

[153] Cf. art. 47 (Plurality of responsible States) of the draft articles on responsibility of State for internationally wrongful acts and the commentary thereto, *Yearbook... 2001*, vol. II (Part Two) and corrigendum, para. 77.

[154] See, e.g., A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of Art* (Cambridge, Cambridge University Press, 2014); Nollkaemper and Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press, 2017).

[155] Institute of International Law, resolution on succession of States in matters of international responsibility, art. 7.

succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory."[156]

113. The resolution of the Institute of International Law reproduces almost verbatim this text in its article 6, paragraph 3.[157] The only difference is that it speaks only about obligations of the predecessor State in respect of an internationally wrongful act accepted by the successor State. This rule, which is fully justified when it comes to *obligations or rights* under treaties in the field of succession of States in respect of treaties, seems to pose certain problems in the context of State responsibility. It is difficult to see why the successor State cannot accept with legally binding effects just the *obligations* of the predecessor State in respect of an internationally wrongful act committed by the predecessor State against another State before the date of succession of States. This is in particular important in cases where the predecessor State ceased to exist. Does it mean that the legal consequences cannot be accepted by the successor State?

114. The present report is not ready to accept this solution quickly. Instead, it proposes to analyse first certain examples of unilateral acts and then the relevant rules on State responsibility and unilateral acts of States adopted thus far by the Commission. Only on the basis of this analysis may some conclusions be proposed.

115. It should be noted that such acts, being unilateral acts from the point of view of international law, usually take the form of laws or even constitutional laws. Therefore, they have certain authority and other States or other persons can rely on them.

116. One of the first modern examples of such acts is section 76 of the Malaysia Act: "(1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State."[158]

117. Another example of legislation that may be interpreted as acknowledgment of the conduct of the organs of the predecessor State is article 140, paragraph 3, of the Constitution of Namibia. It reads as follows:

> "Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament."[159]

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[156] Art. 9, para. 1, of the Vienna Convention on Succession of States in Respect to Treaties.

[157] Art. 6: "3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it."

[158] Sect. 76 of the Malaysia Act, 1963, in United Nations, *Legislative Series, Materials on Succession of States*, ST/LEG/SER.B/14 (see footnote 66 above), p. 93.

[159] Article 140 (3) of the Constitution of Namibia (1990), document S/20967/Add.2.

118. Last but not least, article 5 of the Czech Constitutional Act on measures related to the dissolution of the Czech and Slovak Federative Republic should be mentioned:

> "(2) The Czech Republic assumes all rights and obligations of the Czech and Slovak Federative Republic not specified in Section 4 resulting from international laws as of the date of dissolution of the Czech and Slovak Federative Republic, except for the rights and obligations of the Czech and Slovak Federative Republic linked to those sovereign territories of the Czech and Slovak Federative Republic which are not sovereign territories of the Czech Republic. This in no way affects any claim of the Czech Republic on the Slovak Republic resulting from international legal obligations of the Czech and Slovak Federative Republic accepted by the Czech Republic pursuant to this provision."[160]

119. In the case of the Czechoslovak dissolution, the Czech and the Slovak national parliaments both declared their willingness to assume the rights and obligations arising from the international treaties of the predecessor State before the dissolution.[161] In fact, there were several unilateral acts with a view to accepting rights and obligations of the predecessor State. First, the declaration of national parliaments of 3 December and 17 December 1992, respectively. Next, there were legislative acts, such as the Constitutional Act No. 4/1993 adopted by the Czech National Council.

120. It also constitutes significant practice that both the Czech Republic and the Slovak Republic, when they applied for membership of the Council of Europe after the dissolution of Czechoslovakia and for accession to the European Convention on Human Rights, accepted to be bound by the obligations under that Convention between 1 January and 30 June 1993. The Committee of Ministers of the Council of Europe, at the 496th meeting of the Ministers' Deputies, on 30 June 1993, decided *inter alia* that the Czech Republic and the Slovakia were to be considered Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms as from 1 January 1993, and that both States were considered bound as from that date by the declarations made by the Czech and Slovak Federative Republic regarding articles 25 and 46 of the Convention.[162] This acceptance of the jurisdiction of the European Court of Human Rights may be understood as an acceptance by the successor States of their responsibility under the Convention both for acts committed by Czechoslovakia before the date of succession and for their own acts in the period when they were not formally parties to the Convention.

121. The additional arguments supporting certain effects of unilateral acts for the succession of States in respect of responsibility can be drawn from the codification of rules on State responsibility. It is well known that the articles on responsibility of States for internationally wrongful acts, after presentation of seven grounds of attribution of conduct to a State (in arts. 4 to 10), also introduce in article 11 the

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[160] Sect. 5 (2) of the Constitutional Act No. 4/1993, on measures related to the dissolution of the Czech and Slovak Federative Republic, [English translation from the website of the Parliament of the Czech Republic].

[161] See proclamation of the National Council of Slovakia (see footnote 82 above); proclamation of the National Council of the Czech Republic (*ibid.*).

[162] See note by the secretariat of the Council of Europe, at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=KeXkQm3P&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=CZE&_coeconventions_WAR_coeconventionsportlet_codeNature=10.

hypothesis of a course of conduct acknowledged and adopted by a State as its own.[163]

122. Although this rule of attribution envisages mainly situations where a State, by acts or pronouncements of its official organs, acknowledges and adopts wrongful acts of private persons, it may also be used, *mutatis mutandis*, for an internationally wrongful act of the predecessor State accepted by the successor State. In reality, some cases of succession show, namely in case of dissolution, that an organ of the predecessor State (persons acting in such capacity) simply becomes or devolves into an organ of the successor State. It seems to be logical to admit that the successor State can adopt the conduct in question as its own.

123. This argument is supported by the commentary of the Commission to article 11, referring to the *Lighthouses* arbitration,[164] where a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island". In the context of State succession, the commentary continues, "it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it."[165]

124. Of course, this does not mean that any unilateral act is able to produce the legal effect of acceptance by the successor State of all or some obligations arising from the internationally wrongful act of the predecessor State. Such a unilateral act (acknowledgment or adoption) is indeed subject to rules of international law governing unilateral acts of States. These rules were codified in the previous work of the Commission.[166]

125. Without a claim of completeness, it is useful to recall at least some of Guiding Principles applicable to unilateral declarations of States that can inform the debate of the Commission on unilateral declarations that may constitute acceptance of obligations arising from State responsibility of the predecessor State.

126. First, the wording of Guiding Principle 1 is very important, as it seeks to define unilateral acts and to indicate what they are based on: "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected." In principle, there are no reasons why the unilateral acts of the successor State assuming responsibility for wrongful acts of its predecessor should not follow this guiding principle. Unlike agreements, which are based on

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[163] Art. 11: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State aknowledges and adopts the conduct in question as its own."

[164] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (United Nations publication, Sales No. 63.V.3), p. 155, at p. 198 (1956).

[165] Para. (3) of the commentary to article 11, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

[166] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, General Assembly resolution 61/34 of 4 December 2006. The text of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations with commentary thereto is reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 176-177.

consent (including the implication of the *pacta tertiis* rule), unilateral declarations base their binding character on good faith.

127. Second, "[a]ny State possesses capacity to undertake legal obligations through unilateral declarations".[167] This is a very bold statement, therefore only a good argument could rebut it with respect to the successor States. However, the Special Rapporteur did not find any such argument.

128. Third, "[a] unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so".[168] Guiding Principle 4 refers namely to heads of State, heads of Government and ministers for foreign affairs. It adds, however, that "[o]ther persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence". Without doubt, national parliaments, in particular in countries with a system of parliamentary democracy, are able to bind the State, when adopting legislative acts on succession of States.

129. Fourth, "[u]nilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities".[169] This Guiding Principle also seems to fit to the adoption of a wrongful act of the predecessor State by the successor State. Depending on the particular situation, namely the nature of the obligation breached, the legal consequences of State responsibility may operate *inter partes*, *erga omnes partes* or even *erga omnes*.

130. Next, "[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner".[170] This is a very important qualification, which should be taken into account for the impact of unilateral acts on succession of States in respect of State responsibility.

131. Finally, "[n]o obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration".[171] This is probably one of the most important conclusions to be taken from the Guiding Principles applicable to unilateral declarations of States for the purposes of the present topic. It suggests treating differently the transfer of obligations and the transfer of rights arising from State responsibility, by way of a unilateral declaration of the successor State. Whereas the rights arising from State responsibility cannot be assumed by the successor State only by way of its unilateral declaration (as it implies obligations of other States), the acceptance, by the successor State, of obligations arising from State responsibility should be possible.

132. In view of these considerations, the following draft article is proposed:

Draft article 4: Unilateral declaration by a successor State

1. The rights of a predecessor State arising from an internationally wrongful act committed against it by another State or another subject of international law before the date of succession of States do not become the rights of the successor State by reason only of the fact that the successor State has made a unilateral declaration providing for its assumption of all rights and obligations of the predecessor State.

[167] Guideline Principle 2.
[168] Guideline Principle 4.
[169] Guideline Principle 6.
[170] Guideline Principle 7.
[171] Guideline Principle 9.

2. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it, unless its unilateral declaration is stated in clear and specific terms.

3. Any unilateral declarations by a successor State and their effects are governed by rules of international law applicable to unilateral acts of States.

Chapter III
Future work

Future programme of work

133. Concerning the future programme of work on the present topic, it is the intention of the Special Rapporteur to divide the matter into four reports. The second report (2018) should address the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State. It should distinguish cases where the original State has disappeared (dissolution and unification) and cases where the predecessor State remains (territorial transfer, secession and newly independent States). The third report (2019) should in turn focus on the transfer of the rights or claims of an injured predecessor State to the successor State. The fourth report (2020) could address procedural and miscellaneous issues, including the plurality of successor States and the issue of shared responsibility, or a possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals. Depending on the progress of debate on the reports and the overall workload of the Commission, the entire set of draft articles may be adopted on first reading in 2020 or, at the latest, in 2021.